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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-884

THE RIPON SOCIETY, INC., et al.,
Petitioners,

v.

NATIONAL REPUBLICAN PARTY AND
REPUBLICAN NATIONAL COMMITTEE,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

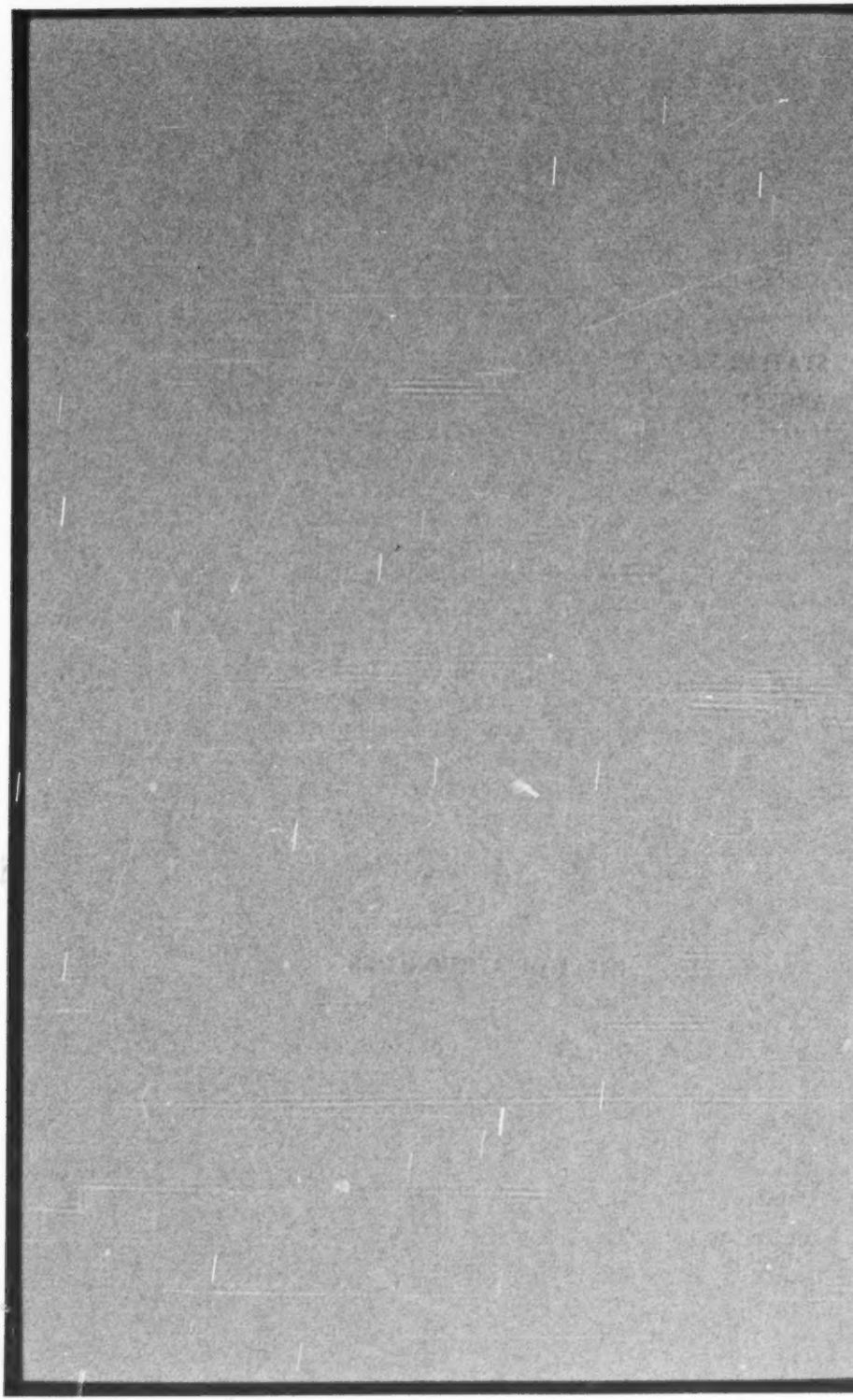
BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WILLIAM C. CRAMER
BENTON L. BECKER
Cramer, Haber & Becker
475 L'Enfant Plaza
Suite 4100
Washington, D.C. 20024

ERWIN N. GRISWOLD
Jones Day Reavis & Pogue
1100 Connecticut Avenue
Washington, D.C. 20036

Counsel for Respondents

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625



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OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, sitting *en banc*, is not yet reported but is reproduced in the Appendix to the Petition at 68.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly held that a political party's apportionment of delegates to national party nominating conventions represents an exercise of the constitutional right of free association and that the apportionment formula for the 1976 Republican National Convention, which the Court of Appeals found was rationally related to a legitimate political interest of the Republican Party, was a valid exercise of that right of free association.

2. Whether the Petition presents a request for an advisory opinion on a moot question, since the petition concedes that relief cannot now be granted in time to affect delegate allocation for the 1976 Republican National Convention.

STATEMENT OF THE CASE

Petitioners are the Ripon Society, Inc. and nine individual members of that Society. Respondents are the Republican National Committee and the National Republican Party.

Petitioners commenced this action by filing their original complaint in District Court for the District of Columbia on November 8, 1971. That complaint challenged the constitutionality of the delegate alloca-

tion formula adopted at the 1968 Republican National Convention for the allocation of delegates to the 1972 Convention (1968 Formula). On April 28, 1972, the District Court issued an order and opinion granting, in part, petitioners' motion for summary judgment. Both parties appealed this ruling to the Court of Appeals. After the Court of Appeals denied respondents' motion for a stay pending appeal, Justice Rehnquist issued an order staying the District Court's judgment. *Republican State Central Committee of Arizona v. Ripon Society Inc.*, 409 U.S. 1222.

The 1972 Republican National Convention, by a vote of 910 to 434, adopted Rule No. 30 to govern the apportionment of delegates to the 1976 Convention. Rule No. 30 is reproduced at pages 4-5 of the Appendix to the Petition (hereinafter *App.* ____). Under the 1976 apportionment formula, the bulk of the delegates are allocated among the states on the basis of three delegates for each Electoral College vote. Rule No. 30 apportions most of the remaining delegates on the basis of the victory bonus provisions challenged by the petitioners. The Presidential victory bonus provision allocates delegates as follows:

> "From each State casting its electoral vote, or a majority thereof, for the Republican Nominee for President in the last preceding election: Four and one-half (4½) Delegates at Large plus the number of the Delegates at Large equal to 60% of the electoral vote from each such State."

In addition, Rule No. 30 provides that one additional delegate shall be awarded to a state for each of the following public officials elected in that state in 1972 or in any election prior to January 1, 1976: (a) a Republican United States Senator; (b) a Republican

Governor; (c) a Republican membership of at least half of the state's delegation to the United States House of Representatives.

After the 1972 National Convention adopted a new delegate allocation formula, thus abandoning the 1968 formula, the Court of Appeals, on November 29, 1972, determined that the litigation was moot and granted leave to petitioners to file a supplemental complaint challenging the 1976 allocation formula. Petitioners filed a supplemental complaint on December 29, 1972, and refiled on April 30, 1973. On January 11, 1974, the District Court granted, in part, Petitioners' Motion for Summary Judgment and issued an order enjoining respondents from adopting a uniform victory bonus provision as part of the delegate allocation formula for the 1976 Republican National Convention (*App.* 17). The District Court's order declared, however, that the 60 percent proportional victory bonus provision of Rule No. 30 "would have a constitutionally rational basis" (*App.* 18). The District Court's opinion is reported at 369 F.Supp. 368 (*App.*

Petitioners and respondents cross-appealed from the District Court's judgment. A division of the Court of Appeals filed an opinion and order on March 5, 1975 (*App.* 19), which was *sua sponte* vacated the same day by an *en banc* order of the Court of Appeals (*App.* 67).

Re-argument was heard before the *en banc* Court of Appeals on May 30, 1975. On September 30, 1975, the Court of Appeals reversed the judgment of the District Court and remanded with directions to dismiss the complaint (*App.* 68). The opinion of the Court by Judge McGowan, in which Judges Wright, Leventhal, Robinson and MacKinnon joined, upheld the delegate allocation formula for the 1976 Republican National

Convention on the basis that it represented a rational exercise of the Party's constitutionally protected right of free association. The Court held that the individual petitioners have standing to sue and that the question of the Ripon Society's alleged standing, while dubious, need not be passed upon. The Court expressly reserved the threshold questions of state action and justiciability[1]

ARGUMENT

I.

THE DECISION OF THE COURT OF APPEALS UPHOLDING THE 1976 DELEGATE ALLOCATION FORMULA AS BEING A RATIONAL EXERCISE OF THE REPUBLICAN PARTY'S CONSTITUTIONAL RIGHT OF FREE ASSOCIATION IS CORRECT IN THE LIGHT OF RECENT DECISIONS OF THIS COURT.

Central to the decision of the Court of Appeals is the principle that in making the essentially political

[1] Judge MacKinnon filed a concurring opinion in which he stated his view that the Ripon Society lacks standing (*App.* 108). Judge Tamm, joined by Judge Robb, filed an opinion concurring in the majority result but on the ground that the requisite state action had not been demonstrated and that the issues were nonjusticiable (*App.* 109, 172). Judge Wilkey filed an opinion concurring in the majority result on the basis of the state action and justiciability issues (*App.* 127). Chief Judge Bazelon, who had written the division's opinion, dissented (*App.* 148). Judge Danaher also filed an opinion (*App.* 159) in which he dissented from the majority's holding on the ground that lack of state action and nonjusticiability precluded a decision on the merits.

decisions of how to structure and apportion the membership of national nominating conventions, political parties are exercising their constitutionally protected right of free association. Giving appropriate recognition to the right of free association, the Court of Appeals concluded that the delegate allocation decisions of political parties should be subject only to limited judicial scrutiny. The Court then articulated the following standard for evaluating delegate allocation formulas:

> "We conclude ... that the Equal Protection Clause, assuming it is applicable, does not require the representation in presidential nominating conventions of some defined constituency on a one person, one vote basis. It is satisfied if the representational scheme and each of its elements rationally advance some legitimate interest of the party in winning elections or otherwise achieving its political goals." (*App.* 101-102).

Since the Court found that the victory bonus provisions of the delegate allocation formula for the 1976 Republican National Convention were rationally related to legitimate political goals of the Republican Party and not invidiously discriminatory, the Court further held that those provisions were protected by the right of free association, saying:

> "... the formula rationally advances legitimate party interests in political effectiveness... There are no racial or other invidious classifications here." (*App.* 105-06)

There is no conflict of decisions among the various courts of appeal on this question. There are decisions on various other questions in the lower courts as recounted in the petition, none of which raise the issues

presented here. Those cases, almost without exception, involve allocation formulas applicable to the direct election of state officials. No cases are cited, indeed no case exists, where any Federal Court acting under any constitutional basis has ordered a national political party to implement or to cease from implementing any particular delegate allocation formula for a national convention. The Court below refused the invitation, saying:

> "What is important for our purposes is that a party's choice, as among various ways of governing itself, of the one which seems best calculated to strengthen the party and advance its interests, deserve the *protection* of the Constitution as much if not more than its condemnation. . . If that is so, there must be a right not only to form political associations but to organize and direct them in the way that will make them most effective. (Emphasis in original). (*App.* 99):

In subjecting political party decisions regarding delegate allocation to limited scrutiny, the Court was guided by recent decisions of this Court. In *O'Brien v. Brown*, 409 U.S. 1, this Court stayed rulings of the Court of Appeals on the constitutionality of certain recommendations made by the Democratic Credentials Committee to the 1972 Democratic National Convention with respect to seating of delegations from Illinois and California. The Court of Appeals' ruling would have limited the convention's discretion relating to delegate challenges and this Court, in issuing its Stay Order, reasoned (p. 4):

> No case is cited to us in which any federal court has undertaken to interject itself into the deliberative processes of a national political convention; no holding of this Court up to now gives support for

judicial intervention in the circumstances presented here, involving as they do, *relationships of great delicacy that are essentially political in nature*. Cf. Luther v. Borden, 7 How. 1 (1849). Judicial intervention in this area traditionally has been approached with great caution and restraint. See Irish v. Democratic-Farmer-Labor Party of Minnesota, 399 F.2d 119 (CA8 1968), affirming 287 F.Supp. 794 (Minn. 1968) and cases cited; Lynch v. Torquato, 343 F.2d 370 (CA3 1965); Smith v. State Exec. Comm. of Dem. Party of Ga., 288 F.Supp. 371 NDGa. 1968). Cf. Ray v. Blair, 343 U.S. 214 (1952). It has been understood since our national political parties first came into being as voluntary associations of individuals that the convention itself is the proper forum for determining intra-party disputes as to which delegates shall be seated. Thus, *these cases involve claims of the power of the federal judiciary to review actions heretofore thought to lie in the control of political parties. Highly important questions are presented concerning justiciability*, whether the action of the Credentials Committee is state action, and if so the reach of the Due Process Clause in this unique context. *Vital rights of association guaranteed by the Constitution are also involved.* (Emphasis supplied.)

In *Cousins v. Wigoda*, 419 U.S. 477, the Court struck down an injunction issued by an Illinois state court against the seating of certain delegates from Illinois at the 1972 Democratic National Convention. The Court held that Illinois had not demonstrated a compelling state interest "to justify the injunction's abridgement of the exercise by petitioners and the National Democratic Party of their constitutionally protected rights of association." (*Id.* at 489) The Court summarized the right of free association of political parties in the following passage (*Id.* at 487-88):

> The National Democratic Party and its adherents enjoy a constitutionally protected right of political association. "There can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments. . . . The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom." Kusper v. Pontikes, 404 U.S. 51, 56-57 (1973) . . . Moreover, "[a]ny interference with the freedom of a party is simultaneously an interference with the freedom of its adherents." Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957); see NAACP v. Button, 371 U.S. 415, 431 (1963).

The Court of Appeals was thus following the guidance provided by *O'Brien v. Brown* and *Cousins v. Wigoda* when it upheld the Republican Party's delegate apportionment decisions on the basis of the Party's right of free association.

Central to a party's exercise of its constitutional right of free association is its right to decide in what manner it can best "achieve the practical advancement of the political ideas for pursuit of which the [party] was formed." *Redfearn v. Delaware Republican State Comm.*, 502 F.2d 1123, 1127-28 (3d Cir. 1974). An integral factor in this decision is the party's determination of what elements of the overall electorate are or would be most receptive to the party's viewpoint and programs, i.e., what the party's "constituency" is or should be. Because the party's "constituency" is not measurable and can only be expressed through the party's own constitutionally protected political judgments, it would be artificial and inappropriate to subject delegate allocation decisions to the basic one

person-one vote standard of *Baker v. Carr*, 369 U.S. 186, and the other reapportionment decisions of this Court. The Court of Appeals clearly acted correctly in declining to apply that standard in the present case.

The finding of the Court of Appeals that the victory bonus provisions of the 1976 delegate apportionment formula are rationally related to a legitimate political interest of the Republican Party can hardly be questioned. In support of this, the Court said:

> As between two states of equal electoral importance, a party could more profitably focus its attention on the one in which it has a chance of victory. This purpose we think is rationally served by the victory bonus system. A state which has gone Republican in the past may do so again. If electoral college apportionment weights the vote of the states according to the value of the prize, the victory bonus system does the same according to the likelihood of winning it.
>
> The victory bonus system may help to keep a state in the Republican camp not only by orienting party policies to that state's interests, but also by providing a reward and incentive for the efforts of that state's party organization. Whether or not it is an effective incentive, it may be the only one that a national party has to offer. In any case, having accepted the legitimacy of such party-strengthening measures, we can hardly say that it is irrational. (*App.* 102-03)

In reaching its decision, the Court of Appeals gave due deference to the interests asserted by petitioners, as reflected in the following passage (*App.* 100-01):

> The First Amendment is of course not our only concern. We are keenly aware that "[a]s a practical matter, the ultimate choice of the mass of voters is predetermined when the nominations

> have been made." If the right to vote is a right to true participation in the elective process, then it is heavily implicated in the nomination process. We do not deny this, but rest our judgment on the view that, as between that right and the right of free political association, the latter is more in need of protection in this case. As is further elaborated below, the right to organize a party in the way that will make it the most effective political organization seems clearly at stake here. The right of one person to one vote is of course preserved in the general election. Theoretically at least, persons dissatisfied with the choice facing them in that election may gain access to the ballot by means other than a major party nomination. They could, of course, form their own party. Of more practical importance is the fact that there are two major parties, which for the time being at least are in intense competition. Persons not heard in one party may be welcomed in the other, and if there are enough such defections, the offending party may lose the general election, as both parties must be well aware. (Footnotes omitted.)

Thus, there is a self-policing mechanism which provides protection against arbitrary actions by the party convention.

The Court recognized that in some instances the balancing of interests reflected in the foregoing quotation might not produce the same result. As the Court stated (*App.* 105-06):

> "To the extent that voting rights are involved, warranting close judicial scrutiny, these rights are offset by the First Amendment rights exercised by the Party in choosing the formula it did. We must emphasize that this is only true because the formula rationally advances legitimate party interests in political effectiveness. The same might

> not always hold true. There are no racial or other invidious classifications here. If there were, the Party's entitlement to constitutional protection would be as slight as those of the victims would be strong. Similarly, we have said that voting rights are not as heavily implicated in a nomination as in an election. It might be otherwise in a case where there is only one party with a realistic chance to win the election, and where a vote in the nominating process is the only effective vote that can be cast. (Footnotes omitted.)

The Court of Appeals carefully balanced the asserted interests of the petitioners against the constitutionally protected right of free association of the Republican Party. Ultimately, the Court followed the guidance of this Court's decisions in *O'Brien v. Brown* and *Cousins v. Wigoda, supra,* in holding that the right of free association protects the party's decisions on allocation of delegates to its 1976 convention. Review of that holding by this Court is not warranted.

II.

THE WRIT SHOULD BE DENIED IN ANY EVENT BECAUSE IT IS CONCEDED THAT IT IS NOW TOO LATE TO AFFECT THE 1976 CONVENTION, THUS REDUCING THE PETITION TO A REQUEST FOR AN ADVISORY OPINION ON A MOOT QUESTION.

The Petitioner acknowledges that effective relief from the challenged provisions of the delegate apportionment formula for the 1976 Republican National Convention could not be granted in time for the Convention. The Petition states (at 25-26):

> "If that formula had been finally adjudicated unconstitutional before October 31, 1975, the Republican National Committee would have had authority, under the rules adopted by the 1972 Convention, to effect its revision. Rule 30, Section A.8, *App. 4-5 n.3*. Once the call to the 1976 Convention is issued, now scheduled for year-end 1975, it will not be possible to alter the number of delegates from each state."

Since the Call for the 1976 Convention, fixing the number of delegates for each state, was mailed on December 5, 1975, seventeen days before the Petitioners filed their Application for Writ of Certiorari, effective relief, as petitioners acknowledge, is now foreclosed. The Republican National Committee waited over two months, following the September 30, 1975 decision of the *en banc* panel of the United States Court of Appeals, before sending out the Call.

This Court is not constitutionally empowered to grant Advisory Opinions. That has been the recognized rule since the early days of the Republic, when the Court refused to give an opinion to Thomas Jefferson, Secretary of State, in 1793. See 3 Correspondence and Public Papers of John Jay (1890) 488-489. See also *Muskrat v. United States*, 219 U.S. 346; *North Carolina v. Rice*, 404 U.S. 244, 246; *Trailmobile v. Whirls*, 331 U.S. 40; *Bell v. Maryland*, 378 U.S. 226. It is no answer to say that this will be simply "a declaratory judgment," and thus covered by *Aetna Life Insurance Co. v. Hayworth*, 300 U.S. 227. No one knows what conclusions will be reached at the 1976 convention with respect to the allocation of delegates in 1980, and no real issue can arise with respect to 1980 until that question is determined. It has been said, of course, that an opinion by this Court would be helpful to the 1976

convention in making its decision. That, however, only serves to emphasize the "advisory" nature of such a decision. If the Court is going to venture into this field at all, it should do so only in a concrete case presenting an actual issue arising out of a determination made by the convention. Otherwise, the Court will be taking "general charge of the electoral process."[2]

Finally, it is said that the Court must decide this issue now, since the question is one which is " 'capable of repetition, yet evading review.' " Pet. 26, quoting *Storer v. Brown*, 415 U.S. 724, 737 n.8. But in this case, there are four years remaining before the 1980 convention. If there is complaint about the actions taken by the 1976 convention, there will be adequate time to present the issues in a concrete case before the courts, where the validity of the actual decision made by the 1976 convention can be litigated – not a hypothetical question, as is inevitable now. Moreover, such a case should not take very long to develop in the District of Columbia, since the views of the Court of Appeals here were made clear by the decision below.

Finally, it may be observed that that decision was rendered on September 30, 1975. The panel decision had been issued on March 5, 1975. At no time did the Petitioner seek review from this Court before judgment in the Court below, as is authorized by 28 U.S.C. 2101. Moreover, even after the en banc decision was rendered on September 30, 1975, the Petitioners waited nearly all of the ninety days following that date before they filed their petition, on December 22, 1975, at which time the Call to the convention had already been

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[2]The phrase comes from Lusky, "By What Right?" (1975) p. 144.

mailed. The Respondents have never sought to delay this case.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

WILLIAM C. CRAMER
BENTON L. BECKER
Cramer, Haber & Becker
475 L'Enfant Plaza, S.W.
Suite 4100
Washington, D.C. 20024

ERWIN N. GRISWOLD
Jones Day Reavis & Pogue
1100 Connecticut Avenue
Washington, D.C. 20036

Counsel for Respondents

January 13, 1976